Neutral Citation Number: [2014] EWCA Civ 1625

Case No: B4/2014/2748

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EAST LONDON FAMILY COURT
HHJ Sleeman
IL13C00792

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2014

Before :

SIR JAMES MUNBY, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE MCFARLANE
and
LORD JUSTICE FLOYD

Re R (A child)

Miss Melanie Johnson (instructed by T.V Edwards Llp) for the **Appellant**
Miss Emily James (instructed by X Local Authority) for the **First Respondent**

The Second Respondent Father appeared in person

Hearing date : 31 October 2014

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Approved Judgment

Lord Justice McFarlane:

1. The young girl at the centre of these proceedings is ES, who was born on 5th September 2012 and who is now aged just over two years. In November 2013, when she was just over one year of age, ES was removed from her mother's care by police exercising their protective powers. Thereafter she has remained in foster care and the subject of proceedings before the Family Court sitting in East London. At the conclusion of those proceedings on 30th June 2014 Deputy Judge Sleeman made a care order with respect to ES and granted an order under Adoption and Children Act 2002, s 21 authorising the local authority to place her for adoption. With the permission of Macur LJ, the mother now seeks to challenge that determination on appeal to this court.

2. We heard the appeal on 31st October 2014 and at the conclusion of oral submissions announced our conclusion which was that the appeal would be dismissed. This judgment represents the reasons why I concurred with that decision.

3. The principal issue in the appeal is whether the judge failed to conduct the welfare analysis in a manner which was compatible with the guidance given by this court in *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563, [2014] 1 FLR 1035. As a result of concern that the requirements of *Re B-S* may have been misunderstood in some quarters, we encouraged counsel, at the conclusion of each of their submissions about the specifics of this appeal, to engage in discussion upon the impact of the *Re B-S* decision during the twelve months that have now passed since that judgment was handed down. The judgments that my Lords and I now give in this appeal are handed down together and have been discussed between us. I propose, in this first judgment, to deal with the merits of the appeal itself. In his judgment, my Lord, Sir James Munby P, considers the wider question of the approach to be taken by local authorities and courts in the light of *Re B-S*. I wish, however, to make it clear that I have considered every aspect of the President's judgment very carefully and am in full agreement with it.

The Appeal – Factual Context

4. ES's mother has two older children, a boy, R, who is now nearly sixteen years old and whose father has taken no part in his son's upbringing, and a younger boy, C, who is now seven years old, and who is the son of the mother's former husband Mr R. Mr R separated from the mother in November 2011 and, in July 2012, R, who is not his son, went to live with Mr R because he was unhappy in his mother's care. That move was followed, in April 2013, by C also moving from the mother's care to live with his father, Mr R. Those moves coincided with the development of a relationship between the mother and ES's father, Mr AR. As the judge found, and the mother accepted, that relationship was characterised by a number of incidents of domestic violence, some of which were of a very serious nature. In addition the mother and father (Mr AR) regularly consumed alcohol in a manner which went to fuel the violence between them and threatened to compromise their ability to provide a safe home for their young baby, ES.

5. It is not necessary to descend to any further detail in describing the impact that the unpredictable and volatile lifestyle of the two parents had upon the baby. The mother accepted that the statutory threshold criteria in Children Act 1989, s 31 were met in

the Autumn of 2013 when proceedings were commenced. The judge went on to find that the consequence of her exposure to life in the family home was that ES was suffering and was likely to suffer significant emotional harm, and that she was exposed to the risk of physical harm, as a result of the frequent alcohol fuelled violence between the parents.

6. On 28th October 2013 the local authority applied to the Family Proceedings Court for an emergency protection order. The justices declined to make an order on that occasion on the basis that the parents entered into a written agreement designed to keep the father away from the family home, restrict his time with ES to supervised contact only, and on the basis that the mother would not drink alcohol whilst ES was in her care. That agreement obviously placed a substantial element of trust upon the parents to stick to its terms. It is clear, sadly, that that trust was misplaced because, less than a week after the agreement was drawn up, it was broken on 3rd November 2013 when the mother and father were found together at the father's sister's home with ES at a time when they were both drinking alcohol. ES was removed from the mother's case under police powers and she remained in foster care from that date under a series of unopposed interim care orders.

7. The court was provided with parenting assessments carried out upon each of the two parents. The result of both assessments was negative, with a recommendation that ES could not be placed in the care of either parent. At the time of the hearing before the judge the father accepted that he could not care for his daughter; however the mother's case was that she could now provide safe and good enough parenting for ES and that it was in the child's interest to be rehabilitated home to her mother under a supervision order.

8. The local authority plan, which was supported by the children's guardian, was for ES to be adopted.

9. The choice facing the judge was stark; no alternative option, such as placement with another family member, was put forward. The court faced a straight choice between rehabilitation of ES to her mother or placement for adoption.

The judge's decision

10. The judge's principal findings of fact are not challenged in the course of this appeal and can therefore be summarised fairly shortly in the following terms:

    a) The mother has had a problem with "binge drinking" which is of many years' standing. On her own admission, she was binge drinking in February 2014, only some four months prior to the final hearing. The mother now accepts that she has a problem, has undertaken a relevant course on two separate occasions, but still, to the judge, sought to draw a distinction between a person who drinks every day and someone who binges at weekends. The judge concluded that the mother was still grappling with her long standing problem of alcohol abuse;

    b) The mother has a vulnerability as a result of a propensity to enter into and remain in abusive relationships. The judge concluded that this was a longstanding problem which had continued for some twelve or

thirteen years. In particular she received, on the judge's findings, "a dreadful beating" in mid-January 2013 from Mr AR, he was arrested and charged with assault, she was the key witness, he was kept in custody until his trial on 22nd February 2013 at which the mother retracted her statement and the charge was dismissed. A few days later she resumed cohabitation with him. Despite the mother describing the incident as "the worst day of my life" the judge found that she lied on oath to the criminal court in order to re-engage in her relationship with Mr AR;

c) The judge found that although, by the date of the hearing, the couple had separated physically, they nevertheless maintained contact with each other and had been on friendly terms in the days before the hearing as a number of Facebook messages demonstrated. The judge found that there continued to be an emotional attachment and concern each for the other and that there was a substantial risk that, once the proceedings were over, they would resume their former abusive relationship;

d) The judge found that the mother was not a witness of truth and that she had lied to the court and the authorities in a number of respects relating, for example, to her cocaine use, her relationship with Mr AR, her own capacity to be aggressive when she feels provoked, particularly when in drink, and the contact that she had had with Mr AR in the lead up to the proceedings.

e) The mother accepted that there was "an attachment problem" between herself and ES. The mother's presentation at contact to her daughter was described in positive terms as being of good quality and demonstrating warmth. Nevertheless ES was described as being "wary of her mother" and exhibiting watchfulness to a level which was concerning to the social worker. The judge accepted the social worker's opinion which was that this young child's reaction arose partly out of fear because she had been present during violent incidents.

The judge was critical of the mother who, despite accepting that there was an attachment problem, was unable or unwilling to acknowledge any connection between the alcohol fuelled violence and the risks to a young child in that setting. The judge was unimpressed by the mother's explanation that the difficulty that existed in her relationship with ES arose because the foster carers could offer the opportunity for the child to play in the garden and also, because of the time that had passed, ES had become attached to her carers.

11. Having found the facts as I have described, the judge went on, first of all, to analyse the case within the framework of the Children Act 1989, s 1(3) welfare checklist. Within that analysis he concluded that placement with the mother would be fraught with difficulty because, partly, of the insecure attachment and, partly, it would be impossible to supervise the mother's care of ES satisfactorily unless a supervisor lived in the mother's home all of the time. He concluded that, because of the mother's past lies, and his conclusion that she could not be trusted in the future, such a level of

support was required but, for obvious reasons, it would be unrealistic to regard that as a tenable way of alleviating the risks.

12. At the conclusion of his CA l989, s 1(3) analysis the judge concluded that he must approve the care plan for adoption and make the care order that was sought by the local authority.

13. He then turned to the application for a placement order. Having correctly recited the statutory test relating to the need to dispense with parental consent, and having drawn attention to the differently worded welfare provision regarding paramount consideration being given to ES's welfare throughout her life, the judge went on to analyse the factors in the case within the structure of the adoption welfare checklist in Adoption and Children Act 2002, s 1(4). In order that the points raised on the mother's behalf in this appeal can be fully understood, I will set out the terms of that analysis in full as they appear at paragraph 35 of the judgment.

> "(a) ES is too young to express her wishes and feelings.
>
> (b) She needs a stable home -- incidentally, I noted the mother moved addresses seven times between November 2011 and March 2013 -- where ES's various needs will be met.
>
> (c) Any change back to the mother will be fraught with difficulty, because I find (1) ES has an insecure attachment to her mother and may not settle properly; (2) it would not be possible to supervise ES's care satisfactory without the supervisor living in the home all the time in the light of the risks. A move is inevitable and a move to an adoptive placement would provide ES with a fresh start and is likely to be successful.
>
> (d) ES is 22 months old and of mixed descent. There is nothing about her age, sex and background that would be likely to prevent her proposed adoption being successful, save [the social worker] will have to monitor ES's ability to attach to new carers carefully, bearing in mind the fact that she has an insecure attachment to her mother.
>
> (e) ES has clearly suffered significant emotional harm at the hands of her parents and at the present time there is a substantial risk that she would suffer further harm of returned to the care f her mother due to her mother's propensity to prioritise her own need to have an abusive relationship fuelled by alcohol over the needs of her child or children.
>
> (f) Neither parent can provide safe and consistent care now or within ES's timescale. ES needs a secure and permanent home now. In my judgment she cannot wait for 12 to 18 months to see if her mother might then be able to care for her safely after undertaking intensive counselling or therapy, which in fact may

> be unsuccessful. There is no other member of the family or friend available to care for ES.
>
> (g) In this case the powers of the Court are either to make a care order on the basis of a care plan for adoption or to make ES the subject of a supervision order whilst allowing her to return to her mother's care. There is I find a substantial risk that if ES was returned to her mother's care under a supervision order that the mother, who has lied to various people, including the Court, and, of course, broken the agreement she signed on 28th October 2013, would not be open and frank about any difficulties she had in relation to her care of ES. She would be unlikely to reveal anything which might lead to ES's removal and would be likely to deliberately hide anything untoward from any supervising officer. Sadly, she cannot be trusted. In my judgment no support which the local authority could provide, short of a family support worker living with the mother in her home and remaining by her side both day and night, which is unrealistic, would alleviate the risks. Therefore I find that, sadly, this Court must approve the care plan and make a care order to the London Borough of Tower Hamlets."

14. Against that analysis the judge concluded that the child's welfare required the court to dispense with the consent of each of the two parents and to make a placement order "because an adoptive placement will provide for ES's need to have a secure and permanent placement".

The Appeal

15. Miss Melanie Johnson, counsel who appeared for the mother before the judge and on appeal before this court, marshalled her arguments under the following headings:

    a) The judge adopted a linear approach;

    b) The judge relied unduly upon the mother's dishonesty;

    c) The judge's exercise of discretion was wrong;

    d) Breach of the Human Rights Act l998.

    I propose to take each of these arguments in turn.

16. To support the criticism that the judge adopted a "linear" approach Miss Johnson referred to paragraph 44 of the judgment in *Re B-S* where my Lord, the President said:

> "We emphasise the words 'global, holistic evaluation'. This point is crucial. The judicial task is to evaluate *all* the options, undertaking a global, holistic and ….multi-faceted evaluation of the child's welfare which takes into account *all* the negatives and positives, *all* the pros and cons of each option. To quote McFarlane LJ again:

> ‘what is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options.’ ”

17. Although we were told that the judge had been provided with copies of the Court of Appeal Decision in *Re B-S* and the Supreme Court decision that preceded it, *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, [2013] 2 FLR 1075, no reference is made to those authorities in the judge’s judgment. Miss Johnson submits that, from the face of the judgment, it is apparent that the judge failed to have sufficient regard to what is now required in the light of those two authorities. She submits that on its face this is a “linear” judgment in which the judge has simply gone through an analysis based upon CA 1989, s1(3) regarding the mother’s capacity to care, then, after ruling her out, goes on to conduct a similar analysis of the placement order application using the checklist in the 2002 Act.

18. There is, to my mind, a danger in casting a single judgment, or, indeed, the process of judicial analysis in any particular set of proceedings if spread over the course of more than one hearing, as “linear” simply because, as a matter of structure, the judge considers and then expresses a conclusion upon a particular option for the child before moving on to consider a further option, for example placement for adoption. The concern at which this court’s judgment in the case of *Re B-S*, and the cases that preceded it, was focussed upon was the substance of the judicial analysis, rather than it’s structure or form.

19. In the present case there were only two options for ES. The judge faced a binary decision. Either the child was to go home on some basis or another to be cared for by her mother, or, given her age, an adoptive placement was to be sought. That was the only issue in the case; that was what the case was all about. The judge had apparently heard four days of evidence followed by a day of oral submissions. The entirety of his judgment, including the analysis under ACA 2002, s 1(4) which follows the announcement of his decision to rule the mother out, is entirely engaged in analysing the positives and negatives from the point of view of the child of that option. Looked at as a whole, which is the perspective that must be applied, it is simply not possible to say that the judge compartmentalised his analysis so as to render his approach worthy of criticism on the basis described in *Re B-S.*

20. Although it does not affect the substance of his evaluation in the present case, I would, however, question the judge’s decision to analyse the issues in the case first under the welfare checklist in CA 1989, prior to making a care order endorsing the care plan for adoption, and before moving on to conduct a second analysis using the welfare checklist in ACA 2002. There was one issue in this case: should the child be returned to the mother or go forward for adoption. That is an adoption question to which the factors in the 2002 Act directly apply. In the circumstances it was necessary, and necessary only, to analyse which outcome was to be chosen, by giving the child’s welfare paramount consideration throughout her lifetime through the lens of the welfare checklist in ACA 2002, s 1(4). There was no need to conduct a preliminary, lower level, analysis using the CA 1989 checklist or to make a care order in the middle of the judgment; if the adoption plan was ultimately chosen then a care order would readily be justified and made at the conclusion of the hearing.

21. Miss Johnson does move some way in progressing her arguments when submitting that the judge does not accentuate any negative factors of adoption, but, in the course of his adoption welfare checklist analysis, he does note that ES will suffer loss by ceasing to have any legal connection with her family, including her half brothers, maternal grandfather and paternal aunt. However, he concludes that her need for a secure and permanent placement is paramount.

22. Dealing with the reality of this case, the judge's findings as to the impossibility of the mother providing a good enough home for ES, save with 24 hour support, are such as to move the option of placement with the mother outside the list of "realistic" options for the child in the manner described in *Re B-S* and in my Lord, the President's judgment in this present case.

23. Upon that basis, superficially attractive though it might have been, Miss Johnson's argument on the linear nature of the judge's approach must fail.

24. The second basis of appeal relates to the finding of dishonesty by the mother. It is submitted that the judge failed to consider the circumstances in which the mother had told lies and consider whether there was a nexus between the mother, on the one hand, telling lies and, on the other, the likelihood of significant harm to the child.

25. I have listed, in summary terms, the findings of dishonesty made by the judge. They are, to a large extent, directly linked to the mother's capacity to care safely for her child in that most, if not all, of them demonstrate an inability on her part to give a realistic, candid and honest account of her circumstances, and therefore those of the child, to those in authority. In my view the judge was entirely justified in, indeed he was driven to, taking full account of these important matters.

26. The submissions made by Miss Johnson to the effect that the judge's exercise of discretion was wrong were given helpful focus by her submission to the effect that any risk assessment is to be broken down into four components.

    (i) Identification of the risk

    (ii) Assessment of the risk

    (iii) Consideration of whether the risk can be managed

    (iv) Consideration of whether the risk can be reduced

    Miss Johnson submitted that the judge did identify the risk at point (i) but did not go on to undertake any of the other three stages that she described.

27. In this regard Miss Johnson is critical of the fact that the positives which are noted by the judge, for example the mother's commitment to contact and the quality of her behaviour during contact, were only brought out from the local authority witnesses during cross-examination. Whilst readily accepting that that may well have been the case, Miss Johnson's criticism that the judge failed to put the positives into the balance cannot be sustained given the reference that the judge makes to them in his judgment.

28. Further, contrary to the submissions made, I consider that the judge did indeed go on to make his own assessment of risk in the manner described by counsel, albeit not using her precise structure. Given his findings as to the deeply entrenched nature of the mother's choice of partners and the pattern of her alcohol abuse, the judge was entitled to conclude that the risk of harm to any child could only be neutralised by the introduction of a professional 24 hour carer; a proposition which is obviously unrealistic.

29. The submissions made in relation to the Human Rights Act l998 were, in effect, to underline the substantive points that had already been made.

30. Miss Emily James, counsel instructed by the local authority before the judge and before this court, made helpful submissions that, for my part, only went to reinforce the view that I had already formed of the mother's appeal. Miss James submitted that the judge conducted a very full assessment all of which went to the ultimate question of whether the risk to ES arising from the mother's potential to behave in a harmful way could be managed. In this context Miss James submitted that the judge's findings as to truthfulness were crucial to the question of risk management. She submitted that the positives were taken into account both by the judge, and, more importantly in her submission, by the thorough social work assessment upon which the judge relied.

31. Miss James specifically drew attention to the local authority care plan which looked in detail at all possible options for the care of ES, including long term residential care in a children's home and, even, special guardianship, albeit that it was common ground that there were no candidates for a special guardianship order.

32. Miss James refutes the submission that the judge's approach was "linear" as, she argues, at all times the judge was making a choice between the only two options available.

Discussion

33. It is impossible not to have a deal of sympathy with the mother in this case, who has been the victim of significant violence at the hands of a series of partners over more than a decade and who, no doubt in part at least as a consequence of that, has resorted to drink so that she is now caught in an addictive pattern of behaviour. She has lost the care of her two older children not through the actions of the local authority, but as a result of the children voluntarily moving. Despite that bleak background, and, because of it, against the odds, she has impressively sought to engage in recent times on courses and other interventions designed to help her break out of the spiral of harmful behaviour that I have described.

34. The question for the judge, as he makes plain in his judgment, is whether the mother could make sufficient progress in a timescale that was compatible with the needs of her young child. For the reasons that I have given his conclusion that she could not was well supported by the findings of fact and, given the entrenched nature of the mother's behaviour and the related underlying problems, it is difficult to consider that any other conclusion was open to him on the evidence.

35. Despite the helpful and clear submissions made on the mother's behalf by Miss Johnson, the outcome of this appeal is equally plain. The judge's judgment is not open

to sustained criticism and the appeal must fail on all grounds. I therefore agreed that this appeal must be dismissed.

Lord Justice Floyd:

36. I agree with the reasons given by McFarlane LJ as to why this appeal must be dismissed.

37. I also agree with the guidance and observations of my Lord, the President, in his judgment.

38. I would add that I do not underestimate the task of trial judges faced with making decisions of momentous importance about the placement of children for adoption. But it is precisely because of the momentous nature of those decisions that the law should and does require the evaluation of all realistic options and the selection, by the reasoned analysis of an independent judge, of that which is in the best interests of the children. Although, as the President points out, the law has not changed, by following the guidance in the decision of the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, [2013] 2 FLR 1075, and the decision of this court in *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563, [2014] 1 FLR 1035, the judge is explaining to the parties, not least the unsuccessful party, why the option selected is best for the child. In so doing he or she will also ensure that the reasoning is apparent to and able easily to be respected by an appellate court (as it has been in this case) which is a further indirect benefit to the child.

Sir James Munby, President of the Family Division :

39. I agree with Lord Justice McFarlane. In relation to his reasons for dismissing this appeal I agree and have nothing to add. In relation to the wider issues which we canvassed with counsel there are, however, some matters which require emphasis.

40. We are grateful for counsel's assistance and, in particular, for the supplementary submissions Miss James prepared following the hearing. Inevitably, much of the information she provided was anecdotal and impressionistic, but it was nonetheless invaluable in illuminating what I can refer to as the post *Re B-S* landscape. It is apparent, and not merely from what Miss James and Miss Johnson have told us, that there is widespread uncertainty, misunderstanding and confusion, which we urgently need to address.

41. There appears to be an impression in some quarters that an adoption application now has to surmount 'a much higher hurdle', or even that 'adoption is over', that 'adoption is a thing of the past.' There is a feeling that 'adoption is a last resort' and 'nothing else will do' have become slogans too often taken to extremes, so that there is now "a shying away from permanency if at all possible" and a 'bending over backwards' to keep the child in the family if at all possible. There is concern that the fact that ours is one of the few countries in Europe which permits adoption notwithstanding parental objection is adding to the uncertainty as to whether adoption can still be put forward as the right and best outcome for a child.

42. There is concern that *Re B-S* is being used as an opportunity to criticise local authorities and social workers inappropriately – there is a feeling that "arguments have become somewhat pedantic over '*B-S* compliance'" – and as an argument in favour of ordering additional and unnecessary evidence and assessments. It is suggested that the number of assessments directed in accordance with section 38(6) of the Children Act 1989 is on the increase. It is said that when social worker assessments of possible family carers are negative, further assessments are increasingly being directed: "To discount a kinship carer, it seems that two negative assessments are required." There is a sense that the threshold for consideration of family and friends as possible carers has been downgraded and is now "worryingly low". Mention is made of a case where the child's solicitor complained that the *Re B-S* analysis, although set out in the evidence, was not presented in a tabular format.

43. We are in no position to evaluate either the prevalence or the validity of such concerns in terms of actual practice 'on the ground', but they plainly need to be addressed, for they are all founded on myths and misconceptions which need to be run to ground and laid to rest.

44. I wish to emphasise, with as much force as possible, that *Re B-S* was not intended to change and has not changed the law. Where adoption is in the child's *best* interests, local authorities must not shy away from seeking, nor courts from making, care orders with a plan for adoption, placement orders and adoption orders. The fact is that there are occasions when nothing but adoption will do, and it is essential in such cases that a child's welfare should not be compromised by keeping them within their family at all costs.

45. The fact that the law in this country permits adoption in circumstances where it would not be permitted in many European countries is neither here nor there. I do not resile from anything I said either in *In re E (A Child) (Care Proceedings: European Dimension)* [2014] EWHC 6 (Fam), [2014] 1 WLR 2670, [2014] 2 FLR 151, or in *Re M (A Child)* [2014] EWCA Civ 152, but for present purposes they are largely beside the point. The Adoption and Children Act 2002 permits, in the circumstances there specified, what can conveniently be referred to as non-consensual adoption. And so long as that remains the law as laid down by Parliament, local authorities and courts, like everyone else, must loyally follow and apply it. Parliamentary democracy, indeed the very rule of law itself, demands no less.

46. The other thing to emphasise – it is a matter I must return to – is the importance of the long-established welfare balance under section 1 (of the 1989 Act or the 2002 Act, as the case may be) and of the use of the 'welfare checklist'.

47. In addition to these general observations I need to elaborate some more specific points.

48. The law and practice are to be found definitively stated in two cases: the decision of the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, [2013] 2 FLR 1075, and the decision of this court in *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563, [2014] 1 FLR 1035.

49. There has been a significant volume of subsequent decisions of this court on the point, most recently the decisions in *Re M-H (A Child)* [2014] EWCA Civ 1396, *Re M (A Child: Long-term Foster care)* [2014] EWCA Civ 1406, *CM v Blackburn with Darwen Borough Council* [2014] EWCA Civ 1479, and *Re Y (Children)* [2014] EWCA Civ 1553. None of these disturb, if in some respects they appropriately amplify, the principles to be found in *Re B* and *Re B-S*.

50. The fundamental principle, as explained in *Re B*, is, and remains, that, where there is opposition from the parent(s), the making of a care order with a plan for adoption, or of a placement order, is permissible only where, in the context of the child's welfare, "nothing else will do". As Baroness Hale of Richmond said in *Re B*, para 198:

> "the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by *overriding requirements* pertaining to the child's welfare, in short, where nothing else will do."

She reiterated the point, para 215:

> "We all agree that an order compulsorily severing the ties between a child and her parents can only be made if "justified by an overriding requirement pertaining to the child's best interests". In other words, the test is one of necessity. Nothing else will do."

This echoes what the Strasbourg court said in *Y v United Kingdom* (2012) 55 EHRR 33, [2012] 2 FLR 332, para 134:

> "family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under article 8 to insist that such ties be maintained."

51. I draw attention to what Lord Justice McFarlane has said in paragraph 20 above. Where, in an application for a care order, the plan is for adoption, the court must have regard not merely to the 'welfare checklist' in section 1(3) of the 1989 Act but also, and even if there is no application for a placement order, to the 'welfare checklist' in section 1(4) of the 2002 Act: see also *In re C (A Child) (Placement for Adoption: Judicial Approach)* [2013] EWCA Civ 1257, [2014] 1 WLR 2247, [2014] 2 FLR 131, paras 29-31.

52. At the end of the day, of course, the court's paramount consideration, in accordance with section 1(2) of the 2002 Act, is the child's welfare "throughout his life." In this regard I should refer to what Macur LJ said in *Re M-H*, para 8, words with which I respectfully agree:

> "I note that the terminology frequently deployed in arguments to this court and, no doubt to those at first instance, omit a significant element of the test as framed by both the Supreme Court and this court, which qualifies the literal interpretation of "nothing else will do". That is, the orders are to be made "only in exceptional circumstances and where motivated by the overriding requirements pertaining to the child's best interests." (See *In Re B*, paragraph 215). In doing so I make clear that this latter comment is not to seek to undermine the fundamental principle expressed in the judgment, merely to redress the difficulty created by the isolation and oft subsequently suggested interpretation of the words "nothing else will do" to the exclusion of any "overriding" welfare considerations in the particular child's case."

53. Likewise of importance is what Black LJ said in *Re M*, paras 31-32:

> "31 … steps are only to be taken down the path towards adoption if it is necessary.
>
> 32 What is necessary is a complex question requiring an evaluation of all of the circumstances. As Lord Neuberger said at §77 of *Re B*, speaking of a care order which in that case would be very likely to result in the child being adopted:
>
> > "It seems to me inherent in section 1(1) [Children Act 1989] that a care order should be a last resort, because the interests of the child would self-evidently require her relationship with her natural parents to be maintained unless no other course was possible *in her interests*." (my emphasis)
>
> I emphasise the last phrase of that passage ("in her interests") because it is an important reminder that what has to be determined is not simply whether any other course is possible but whether there is another course which is possible *and* in the child's interests. This will inevitably be a much more sophisticated question and entirely dependent on the facts of the particular case. Certain options will be readily discarded as not realistically possible, others may be just about possible but not in the child's interests, for instance because the chances of them working out are far too remote, others may in fact be possible but it may be contrary to the interests of the child to pursue them."

54. I repeat and emphasise: At the end of the day, the court's paramount consideration, now as before, is the child's welfare "throughout his life."

55. Nothing that was said in *Re B-S* was intended to erode or otherwise place a gloss upon the statutory requirements of section 1 of the 1989 Act and section 1 of the 2002 Act. On the contrary, the exhortation for courts to undertake a balancing exercise which pits the pros and cons of each realistic option against the others was aimed precisely

at discharging the court's statutory duty under section 1. In particular, before making a decision relating to a child's welfare, a court is required to have regard to, amongst other matters, the factors set out in the relevant 'welfare checklist'. The evaluation of options described in *Re B-S* must undertaken with those factors in full focus.

56. *Re B-S* did not change the *law*. *Re B-S* was primarily directed to *practice*. It expressed (para 30) our:

> "real concerns, shared by other judges, about the recurrent inadequacy of the analysis and reasoning put forward in support of the case for adoption, both in the materials put before the court by local authorities and guardians and also in too many judgments."

It continued "This is nothing new. But it is time to call a halt." It demanded (para 40) that "sloppy practice must stop". It spelt out (see para 33) "what good practice, the 2002 Act and the Convention all demand."

57. The core requirements were identified as follows (paras 33-44):

> "33 Two things are essential – we use that word deliberately and advisedly – both when the court is being asked to approve a care plan for adoption and when it is being asked to make a non-consensual placement order or adoption order.
>
> 34 First, there must be proper evidence both from the local authority and from the guardian. The evidence must address *all* the options which are realistically possible and must contain an analysis of the arguments *for* and *against* each option …
>
> 41 The second thing that is essential, and again we emphasise that word, is an adequately reasoned judgment by the judge …
>
> 44 … The judicial task is to evaluate *all* the options, undertaking a global, holistic and … multi-faceted evaluation of the child's welfare which takes into account *all* the negatives and the positives, *all* the pros and cons, of *each* option."

58. The nature of that exercise has been helpfully illuminated by Ryder LJ in *CM*, para 33. Put more shortly, by Ryder LJ himself, in *Re Y*, para 24:

> "The process of deductive reasoning involves the identification of whether there are realistic options to be compared. If there are, a welfare evaluation is required. That is an exercise which compares the benefits and detriments of each realistic option, one against the other, by reference to the section 1(3) welfare factors. The court identifies the option that is in the best interests of the children and then undertakes a proportionality

> evaluation to ask itself the question whether the interference in family life involved by that best interests option is justified."

I respectfully agree with that, so long as it is always remembered that, in the final analysis, adoption is only to be ordered if the circumstances meet the demanding requirements identified by Baroness Hale in *Re B*, paras 198, 215.

59. I emphasise the words "realistically" (as used in *Re B-S* in the phrase "options which are realistically possible") and "realistic" (as used by Ryder LJ in the phrase "realistic options"). This is fundamental. *Re B-S* does *not* require the further forensic pursuit of options which, having been properly evaluated, typically at an early stage in the proceedings, can legitimately be discarded as not being realistic. *Re B-S* does *not* require that every conceivable option on the spectrum that runs between 'no order' and 'adoption' has to be canvassed and bottomed out with reasons in the evidence and judgment in every single case. Full consideration is required only with respect to those options which are "realistically possible".

60. As Pauffley J said in *Re LRP (A Child) (Care Proceedings: Placement Order)* [2013] EWHC 3974 (Fam), para 40, "the focus should be upon the sensible and practical possibilities rather than every potential outcome, however far-fetched." And, to the same effect, Baker J in *Re HA (A Child)* [2013] EWHC 3634 (Fam), para 28:

> "rigorous analysis and comparison of the realistic options for the child's future … does not require a court in every case to set out in tabular format the arguments for and against every conceivable option. Such a course would tend to obscure, rather than enlighten, the reasoning process."

"Nothing else will do" does *not* mean that "everything else" has to be considered.

61. What is meant by "realistic"? I agree with what Ryder LJ said in *Re Y*, para 28:

> "Realistic is an ordinary English word. It needs no definition or analysis to be applied to the identification of options in a case."

62. In many, indeed probably in most, cases there will be only a relatively small number of realistic options. Occasionally, though probably only in comparatively rare cases, there will be only one realistic option. In that event, of course, there will be no need for the more elaborate processes demanded by *Re B-S* and *CM*: see *Re S (A Child)* [2013] EWCA Civ 1835, paras 45-46, and *Re Y*, paras 23, 25. The task for the court in such a case will simply be to satisfy itself that the one realistic option is indeed in the child's best interests and that the parent's consent can properly be dispensed with in accordance with section 52(1)(b) of the 2002 Act, as explained in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625.

63. Two points require further elaboration.

64. I have referred to the situation where, typically at an early stage in the proceedings, an option, after proper evaluation, can legitimately be discarded as not being realistic. This arises not infrequently with suggestions that various members of the wider family may be suitable carers for the child. The PLO (FPR 2010, PD12A) stresses the

vital importance of such potential carers being identified and assessed, at the latest, as soon as possible after the proceedings have begun. Not infrequently some of those putting themselves forward do not secure a sufficiently positive initial viability assessment to justify pursuing them further as potential carers. In other words, the interim processes under the PLO lead to a judicial determination, prior to the final hearing, that they do not offer a realistic option justifying further consideration. This process not infrequently leads to a 'whittling down' of a longer list of possible options to a sometimes significantly shorter list of the realistic options which alone require consideration at the final hearing.

65. This process of identifying options which can properly be discarded at an early stage in the proceedings itself demands an appropriate degree of rigour, in particular if there is dispute as to whether or not a particular option is or is not realistic. But *Re B-S* does not require that every stone has to be uncovered and the ground exhaustively examined before coming to a conclusion that a particular option is not realistic. Nor is there any basis for assuming that more than one negative assessment is required before a potential carer can be eliminated. On the contrary, in *Re T (Residential Parenting Assessment)* [2011] EWCA Civ 812, [2012] 2 FLR 308, para 93, Black LJ rejected the proposition that:

> "a parent facing the permanent removal of their child has *a right in all cases* to an assessment of their choice rather than one carried out or commissioned by the local authority."

66. The simple fact is that no second assessment can be ordered, nor should it be, unless the court is satisfied that it is, within the meaning of 38(7A) of the 1989 Act or section 13(6) of the Children and Families Act 2014, as the case may be, "necessary to assist the court to resolve the proceedings justly": see *Re S (A Child)* [2014] EWCC B44 (Fam) and *Re M-F (Children)* [2014] EWCA Civ 991, referring back to *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250, and *In re H-L (A Child) (Care Proceedings: Expert Evidence)* [2013] EWCA Civ 655, [2014] 1 WLR 1160, [2013] 2 FLR 1434. In determining whether an assessment is "necessary", the court must adopt a robust and realistic approach, guarding itself against being driven by what in *Re S (A Child)* [2014] EWCC B44 (Fam), para 38, I described as "sentiment or a hope that 'something may turn up'."

67. If, in this way, an aunt or a grandparent can be ruled out before the final hearing as not providing a realistic option, there can in principle be no reason why, in an appropriate case, one or other or even both parents should not likewise be ruled out before the final hearing as not providing a realistic option. *Re B-S* requires focus on the realistic options and if, *on the evidence*, the parent(s) are not a realistic option, then the court can at an early hearing, if appropriate having heard oral evidence, come to that conclusion and rule them out. *North Yorkshire County Council v B* [2008] 1 FLR 1645 is still good law. So the possibility exists, though judges should be appropriately cautious, especially if invited to rule out both parents before the final hearing or, what amounts to the same thing, ruling out before the final hearing the only parent who is putting themself forward as a carer.

68. Lord Justice McFarlane has explained why in this case the complaint that the judge fell into the trap of producing a "linear" judgment fails and must be rejected. I

respectfully agree with his reasoning. I should however like to add a little to what he has said in paragraph 18.

69. A judgment, whether oral or written, is of its nature a literary work – a string of words following in sequence one after the other from the first to the last. In that sense, a judgment is necessarily "linear" in form or, to use my Lord's phrase, in structure. That form or structure almost requires, if the judgment is to have any coherence, that the various options are considered in sequence. The judge, after all, has to start somewhere. As my Lord emphasises, the focus must be on the *substance* of the judicial analysis, rather than its *structure* or *form*. In this context it is useful to have in mind what my Lord said in *Re G (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965, [2014] 1 FLR 670, para 54 (quoted in part in *Re B-S*, para 44):

> "In mounting this critique of the linear model, I am alive to the fact that, of course, a judgment is, by its very nature, a linear structure; in common with every other linear structure, it has a beginning, a middle and an end. My focus is not upon the structure of a judge's judgment but upon that part of the judgment, indeed that part of the judicial analysis before the written or spoken judgment is in fact compiled, where the choice between options actually takes place. What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options."

I respectfully agree.

70. I add a final observation. On 11 November 2014 the National Adoption Leadership Board published *Impact of Court Judgments on Adoption: What the judgments do and do not say*, popularly referred to as the *Re B-S myth-buster*. This document appears to be directed primarily at social workers and, appropriately, not to the judges. It has been the subject of some discussion in family justice circles. I need to make clear that its content has *not* been endorsed by the judiciary.